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What Happens When the Sky Does Fall In?

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ASP Props. Group v Fard

I have written this column on *ASP Props. Group, L.P. v Fard, Inc.* (2005) 133 CA4th 1257, 35 CR3d 343, reported in this issue at p 214, because I am not so much concerned whether the decision to deny the landlord unlawful detainer relief against its tenant was "correct" as I am interested in speculating about what will happen next.

(As far as the merits of the outcome and opinion are concerned, it is not surprising that a court would refuse to read a covenant in a lease calling for the tenant to *maintain* the roof of the building to not include a duty to entirely *replace* the roof if it cannot be otherwise maintained. The language of the original lease was not that clear, there were enough special circumstances involved in how and why it was amended, and there was enough parol evidence to make any construction of the clause justifiable. While the old rule used to be that a tenant's covenant to repair automatically included an obligation to rebuild, unless that burden was specifically excluded (see *Egan v Dodd* (1917) 32 CA 706, 164 P 17), we have since moved so far away from that formalistic (and harsh) position that it requires quite explicit drafting (or exceptional circumstances) to reach that kind of result today.)

But knowing that a tenant cannot be evicted for failing to replace a roof does not answer the many questions that this situation generates. The tenant is hardly likely to volunteer to pay for a new roof itself, and roofs don't replace themselves. So, who is going to do it? The easy answer—the landlord has to do it—is probably wrong.

One of the hardest concepts for me to get across to my students is that saying that a tenant does *not* have some duty to repair is not the equivalent of saying that the landlord therefore *does* have that duty. Law students are so imbued with theories of duty (mainly from their torts classes, I think) that they are uncomfortable with the notion that neither landlord nor tenant may have a duty to the other, as far as certain repairs are concerned.

But the principle of mutual nonduty is, indeed, the original rule regarding disrepairs in rented premises, at least when they are commercial. If some part of the building was broken at the commencement of the term, the principle of caveat emptor kept the tenant from demanding that the landlord correct it. And if it broke during the term, the tenant, not the landlord, was the possessor, and the consequences of the injury would be shared between the parties: The tenant would suffer during the balance of its term and the landlord would suffer during its reversion. Thus, either one could fix it, if it wanted to, but neither owed the other any duty to do so.

As a background rule, this doctrine provides a useful setting for negotiating the parties' respective repair rights and obligations. However, in this case, the landlord made no promise to fix, and the tenant's promise to maintain did not include a duty to replace, which was apparently the only kind of repair that would work. Thus, the default rule was not altered by this lease. The landlord cannot evict the tenant for not paying for a new roof—but can the tenant move out because the landlord won't pay for it either?

I think not. These are commercial premises, so there is neither an implied warranty of habitability nor any statutory repair-and-deduct right involved; those tenant perquisites apply only to residential premises and have never been extended to commercial premises. I do not see any evidence that this is likely to change. Commercial tenants are not favored in the courts and legislature the way residential tenants are. Furthermore, although the facts are not stated too clearly, the structure in this case looks like a single-occupant building, meaning that the roof is not likely to be treated as a common area under the landlord's retained control, generating an independent obligation on the landlord to replace or repair it. Just as the landlord cannot pay for a new roof itself and add the cost to the tenant's rent, I think the tenant cannot pay for a new roof and then subtract the cost from the rent it owes. But this standoff is unlikely to last forever. The roof seems to be leaking badly, and that may matter to each party.

For a tenant, a leaking roof can ruin its business activities inside the building. (Who would want to buy or have their car repaired there?) But if the landlord owes no basic repair obligations to its tenant, as I said above, then its failure to make a repair—even when that inaction leads to untenantable premises—does not entitle the tenant to quit. The theory of constructive eviction requires that some unmet obligation on the part of the landlord cause the untenantability; here, there is no obligation the landlord owes to the tenant on that score. Thus, if the tenant moves out without continuing to pay the rent, it may well be doing so in breach of the lease, thereby making itself liable for damages or future rent (CC §§1951.2, 1951.4).

Conversely, for a landlord, a leaky roof can mean that rain gets inside and warps the floors, damages the electrical system, or does other permanent damage if prompt protective steps are not taken. Because the tenant is the one in possession, it has a duty to avoid waste; under CC §1929, the tenant has an obligation to use ordinary care to preserve the premises against the action of the elements—*e.g.*, it should board up a broken window when it starts to rain. If it does not, it may be held liable for the consequences that ensue, *e.g.*, the buckled floor. (It may also be subject to eviction under CCP §1161(4), which refers to "committing waste . . . contrary to the conditions or covenants of the lease.") But, in this case, the fact that the lease's roof clause does not compel the tenant to purchase a new roof does not mean that it also absolves the tenant from any duty to avoid waste, *i.e.*, to patch up the roof so that the floor isn't ruined. The duty to avoid waste is separate and does not depend on the existence of a repair covenant in the lease.

It is a different type of complication if the roof caves in entirely. Now, the tenant may consider terminating the lease (and stop owing rent) under CC §§1932 or 1933, which replaced the old common law rule that destruction of premises had no effect on the tenant's obligation under the leasehold—and replaced it with the more tenant-oriented civil law rule. Under §1932(2), the perishing of a part of the premises that was the tenant's material inducement for entering the lease allows termination, although it might be hard for a tenant, who took over premises that from the start included a dilapidated roof, to prove that a good roof was a material inducement. Under §1933(4), there can be termination following the destruction of the premises, but that might require a court to determine that the roof alone constituted the premises. Additionally, in either case, a court would have to decide what to do about the fact that the lease itself contained clauses that dealt with the condition of the roof. Again, if the tenant is wrong in its opinion that either of these code sections entitles it to quit, then its departure is a wrongful abandonment, subjecting it to rent or damage liability.

Finally, the City of La Mesa may be the one most unhappy about the condition of the roof, under its building code's health and safety mandate, which undoubtedly includes the remedy of

revoking any applicable certificate of occupancy and padlocking the premises until the roof is replaced. In the first instance, the burden of code compliance is on the owner of the property, but here the tenant covenanted to keep the premises in compliance with these codes. While those clauses may put a prima facie burden on the tenant to make the repairs, the California Supreme Court has declined to give such clauses a literal, "four corners" interpretation, preferring instead a multifactor analysis that is certain to produce uncertainty. See *Brown v Green* (1994) 8 C4th 812, 35 CR2d 598; *Hadian v Schwartz* (1994) 8 C4th 836, 35 CR2d 589. (As an example, how would you compare the term of the lease-where the tenant first took possession in 1993 but signed the 10-year lease in 1997 and perhaps had renewal rights-against the benefits provided by a 15-year roof that had already been in place for over 20 years at the time of litigation?)

Even if one could predict how that analysis would play out in this case, it would only tell us whether the tenant was obliged to pay for the new roof under its covenant to comply with all laws. (I think it quite unlikely that the compliance clause would lead to a result contrary to what the good maintenance clause was held to require.) But on the larger questions of whether the tenant will continue to owe rent after the premises have been shut down by the city, or whether the landlord can evict the tenant in order to work on the roof, we have even fewer answers.

I would not want to be in the uncomfortable position of having to advise either of these parties as to what to do next.